CORPORATIONS COMMITTEE
BUSINESS LAW SECTION
THE STATE BAR OF CALIFORNIA
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April 14, 2006

VIA FEDERAL EXPRESS

Professor Daniel J. Capra
Reporter
Judicial Conference Advisory Committee
on the Federal Rules of Evidence
c/o Fordham University School of Law
140 West 62nd St.
New York, New York 10023

– and –

Administrative Office of the United States Courts
One Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544
Attention: Rules Committee Support Office
Facsimile: 202.502.1755

Re: Proposed Federal Rule of Evidence 502
"Attorney-Client Privilege and Work Product; Waiver by Disclosure"

Dear Professor Capra:

We are writing to comment on the above-referenced proposed Rule 502 of the Federal Rules of Evidence ("Proposed Rule 502") under consideration by the Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee").

These comments are provided on behalf of the Corporations Committee (the "Corporations Committee") of the Business Law Section of the State Bar of California (the "Business Law Section"), with authorization from the Executive Committee thereof. The Business Law Section is composed of attorneys regularly engaged in advising business enterprises in California. The Corporations Committee is one of the Business Law Section's standing committees and is comprised of attorneys regularly advising California corporations and out-of-state corporations transacting business in California.

We applaud and support the Advisory Committee's efforts to advance Proposed Rule 502 and the Advisory Committee's objective of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to a discovery request. However, we oppose the inclusion of the "selective waiver" provision of Proposed Rule 502(b)(3) because, among other things, we believe that (1) it will not fully protect the confidentiality of the attorney-client relationship, and (2) it will not advance the Advisory Committee's objective of reducing the burden and expense of litigation.

The proposed "selective waiver" provision will not protect the confidentiality of the attorney-client privilege or the relationship underlying it. The confidentiality of communications between a client and his or her counsel serves fundamental values in our system of justice. Assuring clients that their communications will be protected enables those clients to obtain adequate legal advice based on full information. Perhaps even more importantly, protection of attorney-client communications helps to minimize possible conflicts of interest between the client and counsel. Protection of the attorney-client privilege is embedded not only in Evidence Codes but also in Rules of Professional Conduct and in statutes governing the obligations of counsel.

Adoption of the proposed "selective waiver" provision would undermine the protections of the attorney-client privilege because it would conflict with state law evidentiary rules that do not recognize a selective waiver. Thus, federal attorney-client privilege would be in many cases simply illusory because a selective waiver would not be recognized under state law.

California does not recognize any form of "selective waiver" of the attorney-client privilege.[1] California Evidence Code Section 912(a) provides that the lawyer-client privilege is "waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication ... to *anyone*." (emphasis added). A waiver occurs even when the recipient of the information is a government agency that agrees to keep the information confidential. *See McKesson HBOC, Inc. v. Sup. Ct.* (2004) 115 Cal. App. 4th 1229, 1236-38. Consequently, we believe that any selective waiver protection available under the proposed rule would be lost in a California proceeding.

California may not be the only state in which the laws on waiver would be inconsistent with the provisions of Proposed Rule 502(b)(3). As was demonstrated in the McKesson HBOC matter itself,[2] actions taken in one jurisdiction that may not constitute waiver may nonetheless result in waiver in another jurisdiction. A "selective waiver" thus may initially provide protection in one jurisdiction but thereafter be lost even in that jurisdiction because of different treatment in another jurisdiction. That kind of uncertainty hardly meets the standard specified by the U.S. Supreme Court: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *U.S. v. Upjohn*, 449 U.S. 383 (1981).

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[1] Both the lawyer-client privilege and the attorney work product doctrine (as each is known under California law) are established by statute. California Evidence Code Section 952 specifies that the privilege applies only with respect to communications between a lawyer and a client "in the course of that relationship and in confidence but a means which so far as the client is aware, discloses the information to no third person other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for ... accomplishment of the purpose for which the lawyer is consulted ...." The scope of the attorney's work product protection is set forth in Code of Civil Procedure Section 2018. California courts do not have the power to change the statutory scope or limits of either protection. *See, e.g., Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 206 (2000); *BP Alaska Explorer, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1254 (1988).

[2] *See, U.S. v. Bergonzi*, 403 F.3d 1048 (9th Cir. 2005)

"Selective waiver" will not reduce the burden and expense of litigation. The Committee believes that Proposed Rule 502(b)(3) will not advance the Advisory Committee's objective of reducing the burden, expense and complexity of litigation. The "selective waiver" provision will create significantly conflicting outcomes and lacks the clarity that a practical rule needs. The Committee believes that the uncertainties attendant to the provision will *increase* — not decrease — judicial decision-making and litigation costs. For example:

- The language of Proposed Rule 502(b)(3) raises significant concerns about the practical application of the provision. For example, how should practicing attorneys interpret the phrase "*during an investigation by that agency*"? Consider, hypothetically, a routine visit by the Federal Aviation Administration to review shipping/receiving procedures of a global manufacturing company headquartered in the U.S.[3] It is unclear whether *a simple inspection* of the facility by the FAA would be considered an "investigation" for purposes of the proposed rule.

- It is also unclear whether the disclosing party must be the target of the investigation to benefit from the protection of Proposed Rule 502(b)(3). If, in the FAA hypothetical, the FAA, while investigating a *third party*, received confidential information from the company regarding that company's violation of the Foreign Corrupt Practices Act, would any attorney-client privilege attaching to that confidential information be considered "waived" by disclosure to the FAA?

- Similar practical concerns arise from the phrase "*limited to persons involved in the transaction.*" Even without exhaustive review, it is apparent that the language is unworkable as a practical matter, both for attorneys and their clients and for regulators.

- How will regulators, the courts, attorneys and their counsel distinguish between government agencies and other parties acting in the government's interest or as its proxy?

- Would the rule protect attorney-client privileged information disclosed to a private plaintiff in a *qui tam* action?

- Would the rule protect attorney-client privileged information disclosed to a private plaintiff acting on behalf of a corporation in a shareholder derivative action?

These questions and others make the proposed provision more likely to spawn litigation than to avoid it.

We hope the foregoing is useful to the Advisory Committee in considering appropriate modifications to Proposed Rule 502 prior to any recommendation by the Advisory Committee to the Standing Committee. There is much in proposed Rule 502 that could be useful in preserving the confidentiality of the attorney-client relationship. But, that effort will be undermined by including a "selective waiver" provision that will encourage demands for waiver rather than protect the privilege.

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[3] These inspections are conducted by the Office of Aviation Analysis. Similar issues would arise in other regulatory inspections, such as those by the Office of the Comptroller of the Currency under 12 USC §481.

Please do not hesitate to contact either of the undersigned if you have any questions on the matters raised here.

Please note that the positions set forth in this letter are only those of the Corporations Committee. As such, they have not been adopted by the Business Law Section or its overall membership, or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California.

Membership on the Corporations Committee and in the Business Law Section is voluntary, and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.

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cc: Neil J. Wertlieb, Esq.
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